

***United States Court of Appeals
for the Second Circuit***



APPENDIX

10-2111

To be argued by
DAVID RAPAPORT

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA *ex rel.*
THERESA SIMMONS,
Petitioner-Appellant,
against

FRANCES CLEMENTE, Superintendent, Bedford Hills
Correctional Facility, Bedford Hills, N. Y.,
Appellee.

Appeal from the Denial of a Writ of Habeas Corpus
by the United States District Court for the
Southern District of New York

APPENDIX TO BRIEF FOR THE APPELLEE

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EXHIBIT A

Statement of Theresa Simmons

Statement of: Theresa Simmons
Made to: Thomas J. Hughes, ADA
Stenographer: Dennis Sheehan
Place: Office of CO, 32nd Sqd.
Date: January 13, 1966 3:35 p.m.
Present: Det. T. Dolan, #1009, 32nd
Det. W. Stanise, #654, 32nd Sqd.

BY MR. HUGHES:

Q My name is Thomas Hughes, I'm an Assistant District Attorney here in New York County. What is your name?

A Theresa Simmons.

Q How old are you?

A 23.

Q Where do you live?

A 312 West 142nd Street.

Q Before we go any further I have to tell you you don't have to talk to me if you don't want to and anything you do say is now being taken down by Mr. Sheehan, the stenographer, and might later be used in evidence. Do you understand that?

A Yes.

Q You have already spoken to me before, haven't you?

A Yes.

Q You have already spoken to Det. Stanise and Det.

Dolan and Lt. Sullivan outside?

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A Yes.

Q This morning at about 4:45 a.m. there was a cab driver shot on 141st Street between 8th and Edgecomb Avenue. What do you know about that?

A Well, I shot him.

Q You shot him with a gun, right?

A Yes.

Q Where did you get the gun?

A From a friend.

Q When did you get the gun?

A Last night.

Q About what time?

A Early part of the evening. I'm not sure.

Q When you got the gun was it loaded or unloaded?

A It was loaded.

Q Did you load it?

A No. It was loaded when I got it.

Q Did your friend load the gun in your presence or did he tell you it was loaded?

A He just told me it was loaded.

Q Is that friend's name Richard or Ricky?

A Richie.

Q He lived on 95th Street?

A Yes.

Q After you got the gun where did you go?

A Up to 116th Street.

Q What were you going to do there?

A I went to see if a friend of mine was up there.

Q What friend was that?

A In a barbecue place.

Q What's the name?

A Renny.

Q Renny?

A Yes.

Q Renny a man or woman?

A Girl. Woman.

Q Was she there?

A Yes.

Q What did you do then?

A I left and start on my way home.

Q Did you talk to Renny?

A Yes.

Q What did you talk about? Did you tell Renny you had a gun?

A No.

Q So then you just spoke to Renny about general stuff?

A Yes.

Q Then you left?

A Yes.

Q About what time was that?

A I don't know.

Q What did you do after you left Benny?

A Went on 8th Avenue, ran into Peggy.

Q Do you know Peggy's last name?

A No.

Q What happened when you met Peggy? Did you talk with her?

A We start talking and went and had some hot chocolate and coffee.

Q Then what happened?

A Then we start talking.

Q What did you talk about?

A She needed some money, I needed some money.

Q Did you agree to do something?

A Yes.

Q What did you agree to do?

A Rob a cab.

Q Did you say to Peggy, "let's rob a cab" or did Peggy say to you, "let's rob a cab"?

A I'm pretty sure I said it to her, let's rob a cab.

Q Did you tell Peggy you had a gun?

A Not at first, no.

Q You finally told her later on?

A Yes.

Q When did you tell her you had a gun, before you got into the cab?

A Oh yes, before we got into the cab.

Q What did Peggy say about the fact you had a gun and were going to rob a cab driver?

A She didn't say nothing.

Q Just the two of you wanted money and you were going to rob a cab?

A Yes. She was sick.

Q She was sick?

A Yes.

Q She had no money?

A She had a couple of dollars.

Q You had a couple of dollars?

A Yes.

Q You needed some more?

A Yes.

Q Where did you get the cab?

A 129th and Madison.

Q Did you walk from 116th where you met Peggy or ride?

A We rode a cab.

Q Why did you ride up there?

A I don't know, just rode.

Q Did you ride to 129th Street in some other cab?

A e got off 128th Street.

Q Did you go from 116th Street to 128th Street in
a cab?

A Yes.

Q Was that after you decided to rob a taxicab?

A Yes, I think so.

Q Why didn't you rob the first taxicab?

A I think because he was young.

Q He was young?

A Real young.

Q You decided not to rob him?

A Yes.

Q You got out at 129th Street, 128th?

A Yes.

Q You walked to 129th?

A Yes.

Q That is when you saw the second cab driver?

A Yes.

Q Did you tell him where to go?

A I told him two stops.

Q What did you tell him first?

A I don't remember the first one.

Q What was the second one?

A 141st between 8th and Edgecomb.

Q While you were in the cab did you talk to Peggy

about sticking up this cab driver?

A I don't -- no, we didn't say that much. I think we both knew this was the one.

Q He was an older man?

A Yes, but I didn't know he was that old.

Q When you got to 141st between 8th and Edgecomb what happened then?

A When he stopped he made a full stop. I put my arm around his neck and put the gun to his head I think. Then I told him, "don't move." Other things were said but I don't remember what it was.

Q You mean by him?

A I don't even remember him saying too much of anything.

Q What other things, by you and Peggy?

A I think Peggy was talking.

Q You don't remember what she said?

A I couldn't remember.

Q What happened? Did the man move?

A He reached down like he was going to get something.

Q Then what happened?

A Next thing I know the gun went off.

Q The gun didn't go off by itself.

A No, it was in my hand but I don't remember pulling the trigger.

Q You had it pressed against his neck.

A No. I don't know where I had it pressed. I thought I had it against his head. They told me he was shot in the neck.

Q After you fired the gun did you feel something in your left arm?

A Yes, a numbness.

Q You found out later you had been shot in your left arm?

A Yes.

Q Was that by the same bullet that went through the man's neck?

A It had to be.

Q Because you only fired one shot?

A Yes.

Q Nobody else fired anything, did they?

A No.

Q Is this the gun I'm show you that you used?

A Yes.

MR. HUGHES: Indicating a chromium colored double barrel pistol, apparently 22 calibre --.

DET. STANISL: Derringer.

MR. HUGHES: -- which is marked American Weapons Corporation, Burbank, California. Frontier Model Derringer 5727. On the other side of the

barrel, manufactured in West Germany, Calibre 22, L.R. This has been initialed by Det. Stanise.

Q After the shot was fired did the man fall forward in the seat?

A He didn't actually fall but he just sat there.

Q What did you and Peggy do?

A I panicked and I ran.

Q What did Peggy do?

A She ran too.

Q Where did you go?

A Home.

Q That's around the corner?

A Yes.

Q Peggy go in your house with you?

A Yes.

Q What did you do with the gun?

A I hand it to Peggy.

Q Did you say something to Peggy about the gun?

A I don't know. I think I told her to hold it.

Q Then you went up to the house, is that it?

A Yes.

Q You gave her the gun before you went into the house?

A No, after I got in the house.

Q In the house you gave her the gun?

A Yes. When my sister went in the kitchen.

Q Did your sister see the gun?

A No.

Q Did you take your coat off then?

A Yes, I took one sleeve out. One of my arms out of my coat.

Q That is the arm that was injured? Or the other?

A The one injured.

Q Did you find your watch?

A Yes, it fell off. I threw it on the table.

Q Is this the watch you were wearing?

A Yes.

MR. HUGHES: This is a watch which has printed on it Endur, water resistant, shock resistant, Swiss made. It has a brown leather strap which is not connected on one end to the case of the watch itself. It is stained with blood.

Q That is the watch you had on last night?

A Yes.

Q After you took off your coat did you attempt to give yourself first aid or did somebody give you first aid?

A My sister called my brother and asked me what happened. I told him somebody cut me and I changed and told him that I slammed my arm in a door.

Q Then what happened? Did your brother --.

A Bandaged it up and tied a tie around my arm.

Q Then where did you go?

A Then my sister took me to the hospital.

Q You went to the hospital, did you give your
right name?

A No.

Q What name did you give?

A Joann Clark.

Q Pictitious address?

A Yes.

Q What address?

A 104 West 140th Street.

Q Did you tell them you had been shot when you
went to the hospital?

A No. I told them I slammed it in a door.

Q Did you finally tell them you had been shot?

A Yes, because the doctor told -- the nurse's aid
looked at it and said it was a bullet wound.

Q Did you get any money from the cab driver?

A No.

Q When you had your arm around his neck and the
gun up against the upper part of his body someplace, his
head or his neck --.

A Yes.

Q -- what was Peggy doing?

A I don't know.

Q She was sitting next to you, wasn't she?

A When we got in she was but all that time I don't remember what happened.

Q After you got out of the cab who took the keys from the taxicab, you or Peggy?

A I didn't.

Q You didn't?

A No, I didn't take anything out of there. I panicked and ran.

Q You don't know what happened to the keys?

A No. Neither the cigar box or the change.

Q You don't know what happened to that either?

A No. I didn't touch nothing.

Q Is that your coat?

A Yes.

Q The coat that is on the couch there.

A Yes.

Q That's a dark colored coat with black and red furry lining. Is that the coat you were wearing last night?

A Yes.

Q Are the trousers your trousers or your brother's?

A Mine. They're not trousers, they're dungarees.

Q You had them on last night?

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A Yes.

MR. HUGHES: No further questions.

--3:50 p.m. --

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EXHIBIT B

Statement of Peggy Barbour

Statement of: Peggy Barbour.
Made to: Thomas J. Hughes, ADA.
Date: January 14, 1966.
Time: 11:10 p.m. to 11:45 p.m.
Place: 32nd Precinct, New York City.
Appearances: Det. Gonzales Sh.#669 Man. North Hom.
Det. Stanise Sh.#654 32nd Sqd.
ADA A. Dan Harris.
Stenographer: Joseph Renda.

BY MR. HUGHES:

Q My name is Thomas Hughes, I'm an assistant district attorney here in New York County; do you understand that?

A Yes.

Q Now, sitting here is Detective Martin Stanise and on the other side is Detective Al Gonzales and behind you is Assistant D.A. Harris. This man with the stenographic machine is Mr. Renda from my office, he's taking down whatever we say; do you understand that?

A Yes, sir.

Q What's your name?

A Peggy Barbour.

Q 20 East 121st Street, apartment 1?

A Yes, sir.

Q Before we go any further I want to tell you you don't have to talk to me if you don't want to and anything we say is being taken down by Mr. Renda and may be used in evidence; do you understand that?

A Yes, sir.

Q Now, yesterday morning, this is the 14th of January today, yesterday was the 13th in the morning at about 4:45, there was a cab driver that was shot on 141st Street near Edgecomb Avenue, right?

A Yes, sir.

Q Now, do you know anything about that?

A Yes, sir.

Q You tell me what happened, there was another girl that was there, her name is Theresa Simmons. Do you know Theresa Simmons?

A Yes, sir.

Q Do you know her by a nickname?

A No, sir.

Q What do you call her?

A Theresa.

Q You call her Tee?

A Tee or Theresa.

Q Did you see Theresa before that cab driver was shot?

A Yes.

Q When did you first see her just prior to the cab driver being shot?

A She came to my house.

Q Where is that?

A This is 20 West 131st Street.

Q About what time did she get there?

A About eight-thirty, nine o'clock.

Q That's the evening of the shooting, right?

A Yes, sir.

Q Was there anybody else in your house when she got there?

A Yes.

Q Do you know what their names are?

A I don't know their last names as well as I know their first names.

Q What are their first names?

A Perry, Cookie, Harold.

Q And yourself, right?

A Yes.

Q Was there anybody else there when Theresa got there?

A Well, I don't think so.

Q What happened when Theresa got there?

A Well, she came in and she sat down.

Q She said hello to you?

A Yes.

Q Did you have any other conversation with her?

A No because when she came in I was in the bed.

Q You were in bed?

A I was in bed. I was asleep. When she came in I woke up to say hello then I went back to sleep.

Q When did you wake up after that again?

A About four hours after that.

Q Were all the other people still there?

A Well, by this time those people have gone and other people came, you know.

Q Did you know who they were that came?

A I don't know their names.

Q There was a reason why they were dropping in and dropping out, wasn't there?

A Yes.

Q That was to look for narcotics?

A Not in my house, no.

Q But to see if anybody can get some, go get some money; is that it?

A Yes.

Q When you woke up Theresa was still there?

A Yes.

Q Is that when you first saw the gun?

A Yes.

Q Who had the gun?

A Theresa.

Q What was she doing with it?

A She was showing it to two other fellows.

Q Do you know their names?

A I know one name is Mike.

Q You don't know his last name?

A No.

Q What was she doing with the gun besides showing it to them?

A She was showing it to them and she took the bullets out and let them work it, you know.

Q Is that a small gun?

A Yes.

Q How many bullets are in there do you know?

A I found out later it was two shells.

Q And how did you find that out?

A Well, I didn't know actually until now, you know.

Q Until now?

A After I read the paper, after I talked to people.

Q Anyhow, it was a small gun, silver colored?

A Yes.

Q Black handle?

A Yes but it wasn't a black handle. It was black tape around the handle.

Q You saw the tape around it?

A Yes.

Q She was showing it to the other two men and she had unloaded it?

A Yes.

Q What were they doing with it?

A They were just trying it out and one boy offered to buy it from her for fifty-dollars.

Q What did she say to that?

A She said no. She would but it wasn't here. She couldn't sell it to her.

Q Did she say whose gun it was?

A No.

Q Did you ever hear the name Richie mentioned?

A No.

Q Then what happened, did she get the gun back?

A Yes.

Q And was it reloaded?

A I don't know.

Q Did you see what happened to the bullets, how she got it into the gun?

A No.

Q Well, did the men leave the apartment or did they stay there?

A They were there, they start talking to them mostly. I was talking to Mike cause I owed Mike a couple of dollars. He was asking me when I was going to give it to him.

Q Did Theresa and yourself talk about going out?

A Oh, not then. She was trying to get somebody else to go with her, you know.

Q What was she saying?

A She was saying that you know, getting some money and she wanted to go to hold up a cab driver.

Q She was saying that?

A Yes.

Q What exactly did she say about holding up a cab driver; do you know? Do you remember?

A Well, the whole conversation was holding up cabs.

Q Was she saying that or were other people saying that?

A She was you know, leading the conversation, talking to people and other people was saying the things they done.

Q What happened after that?

A Well, I was sick and my people were sick and by this time after I broke up I realized that if I laid any longer I was going to get really sick. I had to go out try to get some money some kind of way.

Q What happened then, did you talk to Theresa about going out getting some money?

A We was just going out the house together because she was leaving at the same time I was but she was going to walk with me over to 125th Street to see if I can get any money.

Q How were you going to get the money?

A Turn a trick.

Q Turn a trick means pick up a man?

A Yes.

Q That's with sex and get some money for it, right?

A Yes.

Q You told Theresa you were going to 125th Street

to turn a trick and she was walking along with you?

A Yes.

Q Didn't she say anything about sticking up a cab?

A Well, on the way she was like talking you know, but it wasn't no pressed issue.

Q What was she saying?

A I can't even remember really her exact words. I don't want to lie.

Q If you don't know her exact words what was she saying in general?

A She was talking about everything. I was talking about how the strike messed me up, that I usually have money.

Q Because of the strike you were unable to get your pay check, the strike closed the office early, you were late for it?

A Yes.

Q But what about sticking up a cab, weren't you discussing the fact you were going to stick up a cab?

A No, we weren't discussing that fact because when we go half way we walked about block and half then she hailed a cab so I said you got the money because I thought she was going to take a cab 125th Street and like I didn't have any money. So, I didn't know she did.

Q And you got into the cab with her?

A Yes.

Q What happened when you got into the cab?

A When she got into the cab like she said all you got to do is take the man's money.

Q You mean the cab driver?

A Yes. When she was saying that she was opening the door. She said I'll do the rest.

Q So you got into the cab with her in the same door she got in?

A Yes.

Q You sat on the side which is not behind the driver's seat, in other words you sat behind the passenger's seat?

A Yes. She got in first.

Q She got in first from the right side of the cab; is that right?

A Yes.

Q She sat behind the driver?

A Yes.

Q You sat on the side facing nobody in the front, the driver was on her side?

A Yes.

Q Then what happened, did she discuss with you further about who would take the money and anything else?

A No. I was so confused I didn't know what was going to happen. I didn't really believe she was going to actually go through with it.

Q What happened then?

A She was talking to the driver, she told him to

take her uptown and you know, he was friendly you know, she asked him for a cigarette and he said he don't smoke cigarettes he smoked a pipe you know, like that and she asked him was he smoking a pipe all his life, he was smoking cigarettes before he smoked a pipe and he said no he always smoked a pipe. By this time we were half the way and he made a wrong turn and she said now that's five cents, that's not my fault. He said yes. So, he turned the meter down. I don't know what he did he just moved.

Q He fixed the meter somehow?

A Yes, he changed it whatever he did. It was mostly directions but she said oh, I forgot to tell you something get the keys.

Q She said that to you in the cab? How did she say it did she whisper?

A I said what, she said you know, get the keys.

Q Get the keys?

A Yes.

Q Did you know what keys she was talking about?

A Well, the ignition keys.

Q What happened then?

A So, after that the cab driver stopped cause we was at a destination.

Q Was that 141st Street near edgecomb?

A Yes. When he stopped we was passing the cigarette back and forth. She had the cigarette and like when she jumped

up and put the gun to the man's head you know, like I don't know whether she put it to his head or neck, wherever she put it, she said like give up the money or something on that order. This is a stick up or something. I don't know the exact words.

Q It meant that though?

A Yes.

Q What did she do then when she said that?

A This time he was struggling when she did it and the cigarette was hanging out of her mouth.

Q Where was her arms, she had one arm where?

A Around his shoulder like around him, holding him.

Q That was the left arm was around him?

A I have trouble with my left so let me be sure if you're writing it down. I don't know whether it's left hand or right hand.

Q It doesn't matter if she's left-handed or right. Was the arm nearest the window around the man's shoulder?

A No, the arm that's nearest me was around the man's shoulder.

Q Which arm had the pistol in it?

A (No response)

Q If you don't remember say so?

A It was just the opposite, like this.

Q You're indicating your left arm around the man's shoulder and she had the pistol in her right hand?

A Yes.

Q Was the man struggling?

A Does it matter how important it is whether it's left or right because I don't remember whether it was her left or right, I was getting the keys.

Q There was an arm around the man's shoulder, there was a pistol in the other hand, right?

A Yes.

Q What happened after that?

A I was struggling too. Like I says give her the money.

Q You said to who?

A To the cab driver.

Q You said to him, what did you say to him?

A Give her the money. I was asking him. I don't know exactly what he said. I was asking him to give her the money so he wouldn't have to get hurt.

Q What happened then?

A He struggled and he struggled you know, before we knew the gun went off.

Q The gun went off. Who had the gun when it went off?

A Tee.

Q Tee had it?

A Yes.

Q What did you do when the gun went off?

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A I sat up and looked. I sat right there and I looked. So, she says run, run you know, so I says well, are we going to get the man's money and so she said no, something went wrong, just run. I'll tell you later.

Q What did you do, did you run out then?

A Yes.

Q Before you ran out did you take something from the cab?

A Nothing.

Q Well, later on you went to a roof and put something on a roof, right?

A That was the keys I took when she told me take the keys out, when she put her hand around the man's neck. I reached up grabbed the keys.

Q You turned the car off?

A Well, the car lights was on actually, I guess I must have turned it off in order to get it off.

Q Turned the key off and got it out of the lock and you took the keys with you, right?

A Yes.

Q Are these the keys you took, these two keys?

A It looked like that.

Q There is a little disc on this end and there is a little figure 8 in between them, right?

A Yes.

Q These are the keys? They look like the keys you

took from the cab?

A Yes.

Q What did you do with the keys when you took them?

A Put them in my pocket.

Q What happened after that?

A Well, we was running, I didn't know which way to run, I didn't know where her house was, I had to help her and wait for her.

Q What was wrong with her?

A She said I'm hurt.

Q Do you know where she was hurt?

A No, I didn't know at first but then when we go half way down the block she said like this then I seen her hand, you know.

Q What was wrong with her hand?

A Her hand was bleeding.

Q What happened then, did you go into a building?

A Yes.

Q Did you go upstairs in the building?

A Yes.

Q Did you go into somebody apartment?

A Yes.

Q Do you know whose apartment that was?

A Well, I don't know exactly whose it was. I know her sister. I think her brother.

Q Did you know her sister before that?

A No.

Q Is that Constance you're talking about?

A Yes.

Q Was she there when you went into the apartment?

A Yes.

Q Was her brother there?

A Yes.

Q Is that Nathaniel?

A I don't know his name, I never seen him before.

Q Did Constance do something or what?

A When she seen the bleeding she wanted to know what happened but Tee told me not to tell her what happened and this was when we first got there. Then she said but she's bleeding why don't you take her to the hospital. So, she asked her sister if I can go to the hospital with her so her brother said take her to the hospital.

Q Did her brother do anything before --.

A Her brother came out to see what was happening because her sister kept screaming Tee was bleeding, she was hurt.

Q Did he take a towel and put it around her arm?

A No, he took a tie with a can opener and tied it around her.

Q Tied it around her arm?

A Yes.

Q And then what happened?

A And then they got -- I don't know where the towel came from, Tee was wrapping the towel around it because I had blood on my hands from holding.

Q Trying to help Tee?

A Yes. I went and I was rinsing my hands in the sink. I told her come over to the sink, this is before we put the towel around her because after we put the towel around her it was like an understanding she was going to the hospital.

Q Did you leave the apartment?

A Yes.

Q Who left the apartment you and who else?

A We, Tee and Connie.

Q Constance is the sister?

A Yes.

Q You went downstairs?

A Yes.

Q On the way downstairs did something happen?

A Yes.

Q What happened?

A We had put it together, like she had put her coat on like on one arm, I helped her put the other arm around her shoulder. Now, it was cold outside so like she was in the hall way we had decided that as a matter of fact, they had decided they'd change coats.

Q You mean Constance and Tee?

A Yes.

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Q Did they change coats?

A Yes.

Q After Constance took Tee's coat did Constance put Tee's on herself?

A Yes.

Q And did Constance help Tee put Constance's coat on?

A No, I helped Tee put Connie's coat on.

Q Then what happened?

A I buttoned her coat up over the arm and I said well where is the gun, Tee said the gun was in her jacket pocket.

Q Then Connie had Tee's jacket on now, right?

A Yes.

Q What happened then, the gun was in Tee's jacket and Connie had Tee's jacket. How did the gun get out of Tee's jacket?

A Tee told me take it out of her jacket, I took it out and put it in my pocket.

Q Then what happened, you went downstairs first?

A Yes.

Q Did you go out of the building?

A No, because Connie was looking to see if you know, anybody was outside, we was still inside then she told us go back and we ran back inside and then she said you know, come on and then she said go back again then we ran back

inside. Then she decided she'd go over the roof and come out another building.

Q You went upstairs again?

A Yes. On the way upstairs she decided to put the gun in the house.

Q Who decided?

A Tee.

Q Tee did?

A Yes.

Q Whose house did Tee decide to put the gun?

A Her house.

Q In Connie's house?

A Yes.

Q That's Tee's house too, isn't it? It's the same house as the brother lives in, right?

A I think so.

Q Did you go into the house?

A Yes.

Q And who hid the gun?

A Connie put the gun up, while Connie was putting the gun up I got a towel to wrap up the gun.

Q Who gave Connie the gun?

A I gave Connie the gun.

Q Well, you got the gun out of Tee's pocket in the hallway, right and put it in your own pocket?

A Yes.

Q Then when you got back to the apartment did you give the gun to Connie?

A Yes.

Q It was in your pocket then, right?

A Yes.

Q Did Connie put it somewhere?

A She put it up while I went to the kitchen to get a towel.

Q Do you know where she put it?

A I didn't see that.

Q Connie put the gun away as far as you know and you got a towel to help out Tee again?

A I got a towel to wipe the blood off the floor.

Q Did you go out of the apartment again?

A Yes.

Q Who went out all three of you?

A Tee was standing in the hallway waiting for us to come out.

Q You and Connie went out of the apartment?

A Went into the apartment and came out and --.

Q You met Tee in the hall?

A Yes.

Q Then where did you go?

A We went up to the roof.

Q All three of you?

A Yes.

Q What happened on the roof?

A They looked off to see if anybody was downstairs and so it was all clear, we decided to come back downstairs.

Q Before you decided to go downstairs what did you do on the roof?

A I was up on the roof I discovered I still had the keys because I put my hands in my pocket, we go out in the cold and I said oh, you know, I still got the keys. So, I threw them away.

Q Where did you throw them?

A On the roof.

Q Did you throw them off the roof?

A On the roof.

Q You left them on the roof somewhere?

A I don't know the exact spot, it was near the air.

Q An opening in the roof?

A Yes.

Q Near where the air shaft looks down to the ground?

A Yes.

Q Did you draw a diagram before for the detectives where you left the keys?

A Yes.

Q On a yellow piece of paper?

A Yes.

Q After you put the keys on the roof where did you go then?

A We went back downstairs.

Q And then did you go to the hospital?

A Yes, sir. Went in a taxi cab.

Q Who else went to the hospital?

A Constance, Tee and myself.

Q Did you go into the hospital or did you go on?

A I went on.

Q Where did you go?

A I went home.

Q And how long did you stay home?

A I stayed home all day until it was time for me to go back to work and get my check.

Q All day yesterday? From that time until the morning, until day light?

A Until around twelve o'clock I went get my check.

Q Did you go down get your check yesterday?

A Yes.

Q Did you come home with your check?

A Yes.

Q What did you do after that?

A I had to cash it while I was down there. When I came home I paid couple of debts that I owed, went bought some stuff and took off. I was really sick.

Q And where did you go after that?

A I got my check went to Mel's house. I wasn't home until about 10:30, 11:00 this morning, I'd say. I don't know the time, I can't even say that it was that time but I

know I had went out after I found out that Tee --cause I found out today she was arrested instead --because I was going to go to her house when I got up out of my bed. I was getting ready to go to Tee's house I found out that she was in the precinct and was arrested and that the man was dead.

Q Didn't Cookie and the other girl help you to go to Mel's house?

A Yes, that was after we found out that the man, you know.

Q Then the detectives met you at Mel's house, right?

A Yes, I was on my way to the police station then.

Q Now, since you have been at the police station and since you first met the detectives have they treated you all right?

A They been wonderful.

Q Was anybody harmed you?

A No.

Q Anybody threatened you?

A No. Nobody lay a hand on me.

Q Anything else you want to tell me?

A Not unless you have a question to ask.

MR. HUGHES: Thank you.

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EXHIBIT C

Decision of Justice Davidson

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY PART 30

----- X
PEOPLE OF THE STATE OF NEW YORK :

-against- :

THERESA SIMMONS, :

Defendant :

----- X
DAVIDSON, J.:

Petitioner makes the instant application in the nature of a writ of error coram nobis to set aside the judgment of conviction imposed February 16, 1967, upon the ground that the material evidence adduced at trial was tainted with illegality (Silverthorne Lumber Co. v. U.S. 251 U.S. 385 (1920); Nardone v. U.S. 308 U.S. 338 (1939); Wong Sun v. U.S. 371 U.S. 471 (1963)). Defendant was tried and convicted of the murder of a New York cab driver on January 13, 1966. This request for relief is predicated upon the fact that the defendant while in police custody allegedly gave an inculpatory statement obtained in violation of her constitutional privilege against self incrimination (Miranda v. Arizona, 384 U.S. 436 (1966)). In that statement she revealed the name of her accomplice in the crime who, after being confronted with the facts of the confession, allegedly agreed and did in fact give evidence against this defendant at trial which was material and necessary to the judgment of conviction.

However, this bare finding that the identity of

rant exclusion (People v. Danni, 30 A D 2d 679). The rule of the poisonous tree doctrine as set forth in Silverthorne v. U.S. (supra) would not render such testimonial evidence inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence (People v. Fitzpatrick, 32 N Y 2d 499). The District Attorney's office argues that "the inevitable discovery factor" was indeed present in this case notwithstanding defendant's argument to the contrary, and the record supports these contentions.

The police, during the course of their investigation, went to her apartment and interviewed her brother and sister with whom she resided. Her brother later testified at the trial with respect to his knowledge of the events of January 13, 1966. A consensual search made of the premises also revealed the weapon used in the commission of the crime. It is unquestioned that the discovery of that weapon would have triggered further inquiry and resulted in the eventual identification of the defendant's accomplice who appeared with her at the residence in the early morning hours of January 13, 1966, after the shooting. The defendant, on this application, does not challenge the legality of the seizure having unsuccessfully litigated the motion to suppress before the trial court and on appeal. Moreover, it is neither inferred nor affirmatively stated in the moving papers that the search of the premises and resulting seizure had any causal connection with defendant's alleged

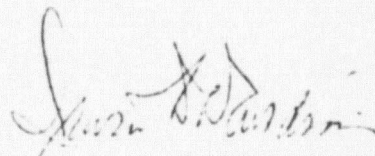
illegal confession. This court, therefore, can draw no other conclusion than an independant police investigation could have and would have yielded the identity of defendant's accomplice. Furthermore, the court cannot agree with the defendancat that her accomplice's testimony was coerced by the very fact of the illegal confession. The existence of the seized weapon and the statements by the defendant's brother would have had an effect on her decision to testify.

On a more technical basis, it is clear that CPL § 440.10 (2) precludes the defendancat from now urging this ground as a basis of a motion to vacate the judgment. The facts set forth in the moving papers were known to defendant at the time of trial and could have been raised then or later upon appeal. Defendant cannot now seek to set aside the judgment by resorting to coram nobis (cf: People v. Bennett, 37 A D 2d 632).

Accordingly, the application for relief is in all respects denied.

The foregoing constitutes the decision and order of this court. The Clerk is directed to forward a copy of this decision to the defendant at her present place of confinement as well as making an additional copy available to counsel.

Dated: September 24, 1973.


J. S. C.

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